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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

BRIEF OF THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC. AS *AMICUS CURIAE*

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Questions Presented

1. Whether a national not-for-profit professional society should be held strictly accountable in treble damage liability under Sections 1 and 2 of the Sherman Act based upon conduct, neither authorized nor ratified by the society, of disloyal volunteer members acting within their apparent authority solely for their own benefit.

2. Whether a national not-for-profit professional society's unintentional participation in a conspiracy to restrain and monopolize trade is a sufficient predicate for the imposition of treble damage liability on the society under Sections 1 and 2 of the Sherman Act.

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Interest of the *Amicus Curiae*

The Institute of Electrical and Electronics Engineers, Inc. ("IEEE" or "Institute") submits this brief *amicus curiae*, with the consent of all parties, in support of reversal of the judgment of the United States Court of Appeals for the Second Circuit entered November 24, 1980. The Court of Appeals held a sister professional society, The American Society of Mechanical Engineers, Inc. ("ASME" or "Petitioner"), liable to account in treble damages under the Sherman Act because of misconduct of two of ASME's 100,000 volunteer members who acted within their apparent authority, without regard to whether their conduct was carried out for ASME's benefit or was ratified by it.

The decision of the Second Circuit poses serious and important policy, practical and operational implications

for IEEE. IEEE is the world's largest engineering society with over 200,000 individual members engaged in a broad range of technical and professional activities, including the development and issuance of voluntary standards, which are designed to advance the theory and practice of electrical and electronics engineering and the allied arts and sciences. The erroneous and unsound rule articulated in the Court of Appeals' opinion subjects professional societies to a species of strict liability in antitrust cases and threatens curtailment of the useful, voluntary standards, technical, publication and educational programs such societies undertake for their good and the public interest.

Opinion Below

The opinion of the Second Circuit Court of Appeals is reported at 635 F.2d 118 (2d Cir. 1980), and appears in the Appendix to ASME's petition for a writ of certiorari at A-1 to A-26.

Statutes Involved

The statutes involved in this case are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1970). These statutes are set forth in full in the Appendix at the end of this brief.

Statement of the Case

ASME is a non-profit technical and scientific society established in 1880 for the purpose of enhancing the use of mechanical engineering in the public interest. ASME has more than 100,000 individual members drawn from industry, academia, government, insurers and consumer groups. It conducts educational and research programs,

publishes a national magazine and a number of research journals devoted to mechanical engineering, and, most important for this case, issues and renders interpretations on over 400 codes and standards designed to improve public safety and promote uniformity. These codes and standards, which are written, revised and interpreted by over 10,000 ASME volunteers, do not have the force of law, though they have been incorporated by reference into many federal, state and local laws, regulations and ordinances.

One of the oldest ASME codes is the Boiler and Pressure Vessel Code (the "B-PV Code"), which defines standards of construction and performance for various components of steam and hot water boilers and other pressure vessels. The first B-PV Code was promulgated in the early part of this century when boiler explosions attributable to poor design or inadequate safety precautions frequently caused death, injury and property damage. (J.A. 928-29).* Section IV of the B-PV Code, which deals with heating boilers, has been adopted in 46 states and all Canadian provinces. (PX 30A at Exh. H, pp. 2-3). Since the promulgation and acceptance of the B-PV Code, boiler explosions have been all but eliminated. (J.A. 929).

Interpretations of ASME codes are provided free to members and nonmembers as a public service. Under procedures set forth in ASME's bylaws, requests for interpretation are referred to the ASME committee responsible for the code in question. The committee, following its own internal procedures, may respond to properly phrased inquiries in writing. ASME receives approximately 20-30,000 such inquiries each year regarding the B-PV Code alone. (J.A. 861). The Boiler and Pressure Vessel Committee ("the B-PV Committee") supervises and interprets the

* The record references in this brief are to the Appendix filed in the Second Circuit Court of Appeals.

B-PV Code and also oversees the Section IV Subcommittee responsible for that section. In answering questions concerning an interpretation of a code, ASME and its committees do not approve, recommend or endorse proprietary or specific designs; instead, they deal only with principles of acceptable levels of safe operation. Thus, letters of inquiry which can only be answered by addressing the acceptability of a particular device or design are not answered by ASME. (AX V.191; J.A. 732-33).

The focus of this case was the improper issuance and later misuse of one letter written by an ASME volunteer interpreting an ASME standard of performance for low-water fuel cut-offs, a safety device incorporated in steam and hot water boilers. Boilers generally include a device that automatically cuts off the fuel supply and shuts down the boiler before the water in the boiler falls to a dangerously low level. If a cut-off device fails, it may result in "dry firing," that is, boiler operation without a sufficient supply of water to moderate the temperature. Dry firing can easily result in an explosion causing injury to persons or property. (J.A. 169, 928).

Fuel cut-offs customarily have operated on a "float" principle. If the water in a boiler drops below a critical level, the float falls, tripping a switch which cuts off the fuel supply. For many years, McDonnell and Miller, Inc. ("M&M"), which manufactured a float-type cut-off device, accounted for most American sales of this product. In 1965, respondent Hydrolevel Corporation ("Hydrolevel") began manufacturing an electrically activated cut-off of the so-called "probe" variety. With a probe cut-off, when water in the vessel is maintained at a certain level, water covers an electrode completing a circuit activating the fuel supply. If the water level falls below the electrode, the circuit

is broken and the fuel supply is terminated. A difficulty with the probe cut-off, when used in a steam boiler, is that bubbling or surging of the boiling water may intermittently activate the cut-off and cause rapid fluctuations in the fuel supply. For this reason, certain Hydrolevel models for residential steam boilers incorporated a "time-delay" element to prevent temporary fluctuations in water level from cutting off the fuel supply. (J.A. 161-62; DX BN, pp. HT 1268-69).

In March of 1971, James Solon, President of M&M, Eugene Mitchell and John James, Vice-Presidents of M&M, and T. R. Hardin, an Executive Vice-President of Hartford Steam Boiler Inspection and Insurance Company ("Hartford"), dined together in Chicago. At the time, James and Hardin were also active as ASME volunteers, Hardin as Chairman and James as Vice-Chairman of the Section IV subcommittee. One topic at the Chicago dinner was the possibility of requesting from ASME advice on whether a low-water fuel cut-off could meet ASME standards if it included a time-delay. (PX 16a, pp. 787-92; PX 18A, pp. 382-88; PX 14, p. 133). After the Chicago meeting, James and Hardin discussed the wording of the request. (PX 16a, pp. 877, *et seq.*)

On April 12, 1971, Mitchell of M&M sent a letter, drafted by James, to W. B. Hoyt, staff Secretary of the B-PV Committee. This letter requested an interpretation of ¶ HG-605 of the B-PV Code. The B-PV Code requires that a glass gauge be placed on heating boilers so that the amount of water in the boiler can be visually determined. (AX V. 8-9 (¶ HG-60(b))). Further, ¶ HG-605(a) requires that a cut-off be located so that the fuel supply automatically will cut off when the surface of the water falls to the lowest visible part of the gauge glass. (AX V. 2 ¶ HG-605(a))).

The April 12, 1971 letter (AX V. 1) inquired whether ¶ HG-605 permitted the incorporation of a time-delay feature in a cut-off if it would operate only "after the boiler water level reaches some point below the visible range of the gauge glass?" Following standard procedures, Hoyt, who had no expertise concerning this aspect of heating boilers, referred the letter to Hardin, as Chairman of the appropriate Subcommittee. (J.A. 864-65, 903-04). Hardin prepared a draft reply, which he sent to Hoyt and the Chairman and Vice-Chairman of the B-PV Committee. (AX V. 6-7).

On April 29, 1971, Hoyt responded to the M&M inquiry by forwarding the "advice" of the Subcommittee Chairman, adopting Hardin's language as an "unofficial communication" (A-7; 635 F.2d at 122). The reply (AX V. 10), in essence, stated that "it is the intent of Par. HG 605(a) that the low-water fuel cut-off operate immediately and positively when the water boiler level falls to the lowest visible part of the water gauge glass," and that a time delay feature which operated after the water had left the gauge glass would provide "no positive assurance that the boiler water level would not fall to a dangerous point during the time delay."

Despite the narrow focus of the April 29 letter, which related only to a time-delay feature that did not begin to operate until water left the gauge glass, officials of M&M misused it in promotional efforts directed at Hydrolevel. In a booklet for its salesmen called "The Opposition—Who They Are, How to Beat Them," M&M included an erroneous statement that "a time delay of any kind in the firing device circuitry would very definitely be against the ASME Code. . . ." (AX V. 11-20). In addition, M&M officials made similar statements to potential customers to persuade them

not to buy the Hydrolevel device. (*See, e.g.*, PX 13, pp. 139-43). ASME at no time participated in this activity; nor was it aware of the misuse of its letter until Hydrolevel brought the matter to its attention in early 1972.

In January 1972, a vice-president of Hydrolevel learned that potential customers had been told about ASME's April 29 letter, and then wrote to Hoyt of ASME requesting a copy of the letter. (J.A. 186-87; AX V. 21). On February 8, 1972, ASME responded, quoting in full the substantive provisions of the April 29 letter. (AX V. 22). On March 23, 1972, the president of Hydrolevel sent a long complaint to Mr. Hoyt and all B-PV Committee and Section IV Subcommittee members requesting that ASME issue a "correcting statement." (AX V. 29-37).

When Hydrolevel's complaint was received, ASME included the matter on the agenda for the next meeting of the Section IV Subcommittee and the B-PV Committee. Hydrolevel was informed of these meetings, and, despite the fact that all ASME meetings are open to nonmembers and to the public, did not send a representative. After discussion in both the Subcommittee and the B-PV Committee, the B-PV Committee drafted a letter specifically informing Hydrolevel that "there is no intent in Section IV to prohibit the use of low water fuel cut-offs having time delays. . . ." The draft was later circulated with the minutes of the Committee meeting to over 300 individuals active in the boiler market (J.A. 673, 837), and was sent out in final form on June 9, 1972. (AX V. 77). Hydrolevel, which could have appealed the June 9, 1972 response to ASME's Policy Board on Codes and Standards had it been dissatisfied with either the contents or the procedures leading to its issuance (App. 818-19), distributed the June 9 letter to customers and potential customers. (J.A. 294; AX V. 78-79).

On August 19, 1975, Hydrolevel filed this suit in the U.S. District Court for the Eastern District of New York. Named along with ASME as defendants were the International Telephone and Telegraph Corporation ("ITT") and Hartford. ITT had purchased M&M in December 1971, and Hartford, according to Hydrolevel, had participated in the conspiracy through the acts of Hardin. Prior to trial, ITT and Hartford settled the charges against them for $725,000 and $75,000, respectively, and an amended complaint was filed naming ASME as the sole defendant.

The amended complaint against ASME originally contained several counts based on state law charges and those counts were voluntarily withdrawn before trial. That left a remaining count charging that ASME conspired with M&M and Hartford to restrain trade in violation of Section 1 of the Sherman Act and to monopolize the low-water cut-off market in violation of Section 2. (J.A. 62-65). The apparent theory of the complaint was that through issuance and misuse of the April 29, 1971 letter, ASME conspired with M&M and Hartford to eliminate Hydrolevel as a potential force in the cut-off market.

At trial, Hydrolevel's theory was that James and Hardin devised and posed a "loaded" question to ASME, and then arranged for an intentionally misleading response by ASME contained in the April 29, 1971 letter and that ASME participated in and was liable for these acts. At the close of the plaintiff's case, the trial judge rejected this hypothesis, ruling that there was insufficient evidence to show that ASME had knowledge of or was liable for the issuance of the April 29 letter. (J.A. 593-94). Instead, the Court allowed the case to proceed on a previously unarticulated theory that ASME might be liable for M&M's

activities because it failed to take more effective steps when it first learned of them in 1972. (J.A. 594).

With respect to the liability of ASME for conspiracy, the District Court charged the jury that in order to find ASME responsible for the acts of its representatives, they had to find that ASME ratified the acts of its agents or that the agents acted to advance ASME's interests. 635 F.2d at 124-25. The lower court rejected plaintiff's proposed charge to the effect that "ASME would be responsible for its agents' actions if they acted within the scope of their apparent authority, even if they did not intend to benefit ASME." On the instruction given, the jury returned a verdict for Hydrolevel. 635 F.2d at 124.

On appeal to the United States Court of Appeals for the Second Circuit, the parties' arguments focused on whether the evidence would support a verdict for Hydrolevel under either of the theories presented to the jury through the trial judge's instructions. The first of these was whether there was any evidence that ASME intentionally or deliberately participated in a conspiracy to restrain and monopolize trade; the second was whether ASME's conduct in response to disclosure of the misleading use of the letter issued through ASME amounted to ratification by it of the acts on which the conspiracy was based. Without reaching either of the theories advanced by the parties, the Court of Appeals affirmed the jury verdict below holding that "the district court erred in refusing Hydrolevel's requested jury instruction that incorporated an apparent authority theory." 635 F.2d at 125.

In reaching its result, the Second Circuit acknowledged that the "appropriate theory for conventional torts" holds that ASME as a corporation could be liable for the acts of its agents only if the agents acted to advance the cor-

porate principal's interest. The court, however, discarded the established agency rule and held that to sustain ASME's liability for punitive treble damages, Hydrolevel had to prove "only that ASME's agents acted within their apparent authority when participating in the conspiracy; it did not have to demonstrate that they also acted in part to benefit ASME or that ASME later ratified their actions." 635 F.2d at 127.

ASME filed a timely petition for rehearing *en banc* on December 15, 1980, and a petition for a writ of certiorari on April 22, 1981.* This Court granted ASME's petition on June 16, 1981.

Summary of Argument

The Second Circuit has enunciated a new rule and policy that professional societies may be held liable to respond in treble damages under the Sherman Act for the acts of their volunteer members within their apparent authority, even if the agents acted to benefit only themselves and not the society principal's interests. A long line of authority in this Court and elsewhere permits corporate vicarious liability under the Sherman Act only when an agent acts in the ordinary course of business to advance the principal's interests or when the principal ratifies the agent's conduct. The Court of Appeals' unreasoned and misguided interpretation of the Sherman Act places professional societies at risk of strict antitrust liability based on a showing of mere unintentional participation in asserted unlawful conduct and strikes at the foundation of such societies' system of voluntary participation in useful technical, publication and educational programs. The over-

* Hydrolevel also filed a cross-petition for a writ of certiorari on damage issues in its case the same day.

reaching new rule thus seriously threatens to curtail many of these beneficial activities.

For decades, the IEEE and other professional societies have, through dedicated volunteer efforts, issued and interpreted industrial and engineering standards, published and disseminated technical information, and fostered continuing technical and professional education in the public interest. They have done so through volunteer efforts structured in such a way as to recognize professional creativity, ingenuity and diversity, while, at the same time, providing a framework of procedural controls for institutional review to foster effective management and to aid in compliance with law, including the antitrust laws. This system of voluntary participation, guided by flexible controls reflective of the diverse character of professional societies and their members, has resulted in valuable technical advancement, greater industrial competence and achievements and greater societal understanding of the use and value of engineering knowledge and technology.

The Second Circuit's unfounded rule of strict accountability under the Sherman Act conflicts both with the philosophy of voluntary participation in professional society programs and with the realities of day-to-day functioning of such societies. Its imposition may needlessly and substantially undercut the willingness of societies and their members to devote time to professional society activities and to continue to explore new areas of technical and professional endeavor because the attendant antitrust risks of participation will be heightened greatly and because these risks cannot be sufficiently minimized by imposing more review and controls without choking the system of voluntary participation. Indeed, a rule of strict liability may herald the curtailment of beneficial professional society programs in any case where organizational

procedures theoretically may be abused by volunteer members for individual commercial advantage. In a large society such as IEEE, a significant number of such programs may be jeopardized, in spite of the existence of reasonable, workable procedural controls because of the impossibility of policing all society members' conduct.

The long established agency rule, on the other hand, is the appropriate one, for it embodies the flexibility and fairness necessary to make it workable. As a practical matter, a society's liability under that rule depends upon a showing that it ratified unlawful acts of agents not carried out for the society's benefit. The requirement thus provides a society with a fair opportunity to properly disassociate itself from the wrongful acts of disloyal members, which, in turn, allows a society to continue to sponsor useful programs without fear of their curtailment due to the imposition of strict antitrust liability.

Accordingly, the Second Circuit's ill-conceived, overbroad rule of strict antitrust liability for professional societies, which lacks any demonstrable legal or practical foundations, should, at a minimum, be overturned and the case remanded to the Second Circuit for a determination of the issue of liability consistent with the proper legal standard.

ARGUMENT

The Second Circuit's Overbroad And Unreasoned Ruling Imposing Strict Antitrust Liability on the ASME Should Be Reversed Because It May Substantially Impair Beneficial Voluntary Technical, Publication and Educational Activities of Professional Societies Against the Public Interest.

A. *The Court of Appeals Applied An Erroneous Standard of Agency Liability Under the Sherman Act.*

The Court of Appeals, in rejecting the District Court's instruction on agency liability, cast aside an undeviating line of decisions in this Court and the lower federal courts which holds that the acts of an agent may be chargeable to his corporate principal under the Sherman Act only when the agent's conduct is both within the scope of his employment authority and is devoted to advancing the principal's interest. *Coronado Coal Co.* v. *United Mine Workers*, 268 U.S. 295, 304 (1925); *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Truck Drivers' Local No. 421* v. *United States*, 128 F.2d 227, 235-36 (8th Cir. 1942); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 830 (D. Md. 1937). That such a rule has been applied in cases arising under the Sherman Act is not surprising in light of its widespread application by the courts to other federal statutory claims. *E.g.*, *United States* v. *Demauro*, 581 F.2d 50, 53 (2d Cir. 1978) (applicable to

Bank Secrecy Act*); *United States* v. *Ridglea State Bank*, 357 F.2d 495, 498-500 (5th Cir. 1966) (applicable to False Claims Act); *Steere Tank Lines, Inc.* v. *United States*, 330 F.2d 719, 722-24 (5th Cir. 1964) (applicable to Interstate Commerce Commission regulations); *United States* v. *Carter*, 311 F.2d 934, 942-43 (5th Cir. 1963) (applicable to Taft-Hartley Act); *Standard Oil* v. *United States*, 307 F.2d 120, 128-29 (5th Cir. 1962) (applicable to Connally Hot Oil Act).

Despite the plethora of contrary authority, the Second Circuit Court of Appeals employed a novel approach to agency concepts which has exposed ASME to antitrust treble damages on proof that "ASME's agents acted within their apparent authority when participating in the conspiracy" (635 F.2d at 127) irrespective of whether "they also acted in part to benefit ASME or that ASME later ratified their actions." (*Id.*). The Court's rationale for its new standard was that it would "induce greater care to prevent misconduct by agents occupying especially sensitive or responsible positions that invite reliance. . . ." *Id.* at 125. In overextending the proper rule, however, the Court of Appeals ignored the fact that no evidence existed to demonstrate that ASME's disloyal volunteers acted in any way to benefit ASME in a conspiracy to restrain and monopolize trade under the Sherman Act. Moreover, the Circuit Court explicitly recognized that ASME neither had prior knowledge of the illicit acts nor an intention to participate in them, for it found instead that ASME's participation was "unintentional." *Id.* at 131.

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* Indeed, in setting forth what it termed a "general rule of agency liability" in *Demauro*, the Second Circuit, in contrast to its approach in the decision below, did not differentiate on the basis of the statutory contexts in which asserted legal claims arose, and, in fact, cited in support of the "rule," *inter alia*, United States v. American Radiator & Standard Sanitary Corp., *supra*, which applied the "general rule" to claims under the antitrust laws. 581 F.2d at 53.

By its decision, therefore, the Second Circuit has placed its imprimatur on a unique rule where, in effect, strict antitrust liablity will attach to an unintentional participant in conduct violative of the Sherman Act solely by virtue of the unauthorized acts of a disloyal agent who intended to benefit only himself and whose acts were not ratified by his principal. Such a rule is without precedent in law and without foundation in the record.

B. *The IEEE Has Engaged in Useful Technical, Publication and Educational Programs for the Benefit of Its Members and the Public.*

The Second Circuit's unsound rule and policy of strict accountability for professional societies under the Sherman Act also promise to subject societies' beneficial technical, publication and educational activities to a host of needless and harmful consequences, and its deleterious impact will be experienced directly by IEEE. The Institute, which dates to 1884 with the establishment of the American Institute of Electrical Engineers, is currently the world's largest engineering society. Its objectives are both technical and professional in nature and are intended to promote the theory and practice of electrical and electronics engineering, the allied arts and sciences and engineering disciplines. The IEEE is also committed to enhancing the quality of life for all people through the application of technology in its field of competence and to promoting the understanding of the influence of that technology in the public welfare. As a transnational organization, IEEE serves more than 200,000 members organized geographically into 10 worldwide regions and various local sections and student branches. Primarily through libraries, the IEEE's services also reach some 10,000 nonmember subscribers with its wide variety of publication services.

Among the many technical activities carried out by IEEE is the drafting and promulgation of voluntary standards,* an activity which figured centrally in the antitrust claim against ASME upheld by the Court of Appeals. IEEE has well over a hundred technical committees involved in standards development, comprising 20,000 members covering some 850 standards projects and over 400 published standards. IEEE also provides formal representatives to other standardizing bodies. These standards are used by the industrial world for technical communications, for reproducibility of scientific measurement, for public safety, and for regulation. They provide common ground for communication among those using the standards and help to

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*IEEE standards are documents which set forth:

"(1) Lists of terms, definitions, or symbols, applicable to any field of science or technology within the scope of IEEE; (2) Expositions of scientific methods of measurement or tests of the parameters or performance of any device, apparatus, system or phenomenon associated with the art, science, or technology of any field within the scope of IEEE; (3) Characteristics, performance, and safety requirements associated with devices, equipments, and systems, with engineering installations; or (4) Recommendations reflecting current state-of-the-art in the application of engineering principles to any field of technology within the scope of IEEE." IEEE Standards Manual 1.2 (March 1978).

IEEE standards are "voluntary." The use of that term in this connection means that the choice of standards to be developed is voluntary; that the implementation of the standards developed is voluntary; that the organizations that develop standards are primarily organized to perform other functions and voluntarily develop standards because they have the unique expertise to do so; and that the individuals who work on the development of standards volunteer their time and effort as a public service. Further, the application of these standards is also voluntary so that standards are used because their users have decided that they have merit and meet their requirements. This voluntary system has been responsible for effective utilization of technology at low cost to the public, and had in many ways been responsible for the technological leadership of the United States since the turn of this century.

make possible the safe wiring of public buildings, the safe transmission and distribution of electric power, the licensing of nuclear power stations by the Nuclear Regulatory Commission, the maintenance of safe industrial work places through federal agency regulations, the communication among people through telephone and radio systems, and the economic health and well-being of the peoples of the world through promotion of common international practices. Most significantly, these benefits are achieved essentially through the contributions of dedicated volunteer engineers and scientists working within the organizational structure of IEEE technical societies.

Standards development and interpretation within IEEE are governed by procedures designed to achieve fairness by ensuring, for example, a balance of interests on standards committees, as well as the achievement of overall consensus by requiring, among other things, a high level of voting approval before issuance of a standard. The IEEE also works to adhere to the essentials of due process in handling complaints about standards through various appeals within the IEEE organization.* However, given the number of volunteer participants and the diversity of subject matter covered by its standards, the Institute, within the framework of a flexible, voluntary system, realistically cannot oversee the activities of each standards or technical committee in minute detail.

Standards-making is only one of IEEE's technical activities, and other technical activities of the Institute share similar characteristics. The broad range of technical activities includes acoustics, ocean engineering, vehicular technology, nuclear science, information theory, management and social implications of technology. Each year, through

* The ASME follows substantially similar procedures in developing its own standards.

its technical and regional entities, the IEEE sponsors or co-sponsors 150 major conferences and conventions. Most of these conference meetings publish proceedings and the conference books contain as many as 13,000 papers annually.

Control over technical activities, reflecting the diversified and voluntary nature of IEEE, is exercised, according to the Institute's Constitution and Bylaws, through governing groups of IEEE's thirty-one technical societies and councils, which, in turn, have an infrastructure of hundreds of committees on which thousands of members serve. Most of these committees have their own stationery with the IEEE logo and identification and are capable of acting with a fair degree of autonomy and independence. Moreover, while the technical papers and conference publications at the core of IEEE technical activities are subject to review by peer-reviewers, many deal with controversial issues which may have considerable commercial significance, and not all can be reviewed in minute detail before presentation or publication.

The IEEE's voluntary standards and technical activities are complemented by its publishing and educational programs. The IEEE perceives as one of its most important services to the engineering and scientific communities the dissemination of evaluated technical information to advance knowledge and the state of the art. In its role as publisher, the IEEE publishes some 16,000 technical papers each year accounting for almost fifteen percent of the total world literature in electrical and electronics engineering, which, because of their high quality, have achieved supranational recognition. The feasibility and quality of the publication enterprise depend on the volunteer efforts of some 15,000 members who act as reviewers and another 500 who serve as editors and conference organizers. In this area, as in others, the Institute has imposed reasonable general or-

ganizational and operating controls by virtue of peer review and reviewer selection, but it is not in a position to second-guess the motives or the commercial intentions of all reviewers, some of whom might be regarded as potential professional or commercial competitors of a particular author.

In similar fashion, the Institute's educational programs draw upon volunteer support to further the important engineering and societal goals of maintaining a high level of engineering technology and education in collegiate engineering programs and in post-graduate continuing education. In the field of continuing education, the Institute offers over 170 different short courses on a broad range of engineering topics through the efforts of 600 to 1,000 volunteers. At the undergraduate level, the Institute acts to advance engineering knowledge through participation in the formulation of collegiate curricula. In addition, the Institute, in conjunction with the Accreditation Board for Engineering and Technology, voluntarily accredits engineering programs on the basis that they represent a satisfactory level of engineering education for over 390 separate engineering programs at over 100 colleges and universities. Here again, the Institute relies on general peer review to ensure reasonable control over the activities of volunteer members and to reduce the risk that specific members' personal or commercial interests might be used for individual advantage to the detriment of competing interests.

C. *The Second Circuit's Unwise Rule of Strict Antitrust Liability May Seriously Impede Continuation of the Beneficial Programs of IEEE and Other Professional Societies.*

Retention of the expansive rule endorsed by the Court of Appeals seriously threatens to affect the useful standards, technical, publication and educational activities of the Institute and other similar societies by undermining

the voluntary participation of society members and by exposing members and society organizations to much greater and unwarranted antitrust risks through the imposition of strict antitrust liability. This result is clearly counter to the recognition that professional societies perform valuable functions for their members and society as a whole. This Court acknowledged over a half-century ago that trade and professional societies have undertaken a wide range of programs "which are admittedly beneficial to the industry and to consumers. . . ." *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 536, 566 (1925). Without the consistent support and devotion of time of its volunteer members, IEEE's standards, technical, publication and educational programs could not continue in their present form. Nor would such beneficial programs be absorbed by government for its resources are likewise limited. In short, the unwise policy of the Court of Appeals' new rule is not in the public interest and it will in all likelihood be practically unworkable.

In the standards-making area, budgetary and organizational constraints simply will not permit the kind of pervasive supervision of IEEE's preexisting consensus system, designed to balance interests and establish fair standards, that the Court of Appeals' rule seems to require in order to minimize the risk of antitrust liability. As a result, the Institute's contributions in this area might be seriously diminished. Moreover, the *in terrorem* effect of the Second Circuit's rule may well bear on the willingness of members or their employers to participate in IEEE standards programs.

Further, the impact of the new rule of strict accountability, with its enfeeblement of the voluntary participatory system that is the hallmark of the activities of the IEEE and other professional societies, will spill over into the

technical, publication and educational activities of the Institute with the same harmful consequences. In each of these areas, the Institute has hundreds, in some cases thousands, of volunteer members working to advance the interests both of the engineering profession and of society as a whole by expanding the knowledge and quality of engineering services and technology. IEEE has taken reasonable steps to reduce or eliminate risks that its procedures might be misused to allow a particular, selfish competitive interest to win out at others' expense.

Notwithstanding these efforts, the Court of Appeals' rule superimposes the impractical and unfair requirement that IEEE and other societies are to be subject to the heightened risk of strict liability for less than intentional wrongdoing. In contrast, the established and proper standard of agency liability, which conditions the liability of the corporate society principal on proof of ratification of unlawful conduct where the agent's acts were not taken to benefit the principal, does not work the harm the Second Circuit's rule clearly does. Under that traditional rule, the requirement of proof of a society's ratification of illegal conduct, while necessarily a matter to be resolved on a case-by-case basis, realistically provides the society with a prior opportunity to separate itself in an appropriate way from the wrongful conduct of errant members. The existence of the ratification requirement, and particularly the reasonable opportunity it presents to avoid corporate antitrust violations, represent a flexible and fair accommodation of the interests of law and professional societies which may promote the continuation of beneficial society programs. The Court of Appeals' unfair and overbroad rule, however, has no such elements of flexibility and fairness, and it should not be allowed to stand by this Court.

CONCLUSION

For the foregoing reasons, IEEE respectfully prays that, at a minimum, the judgment of the Second Circuit Court of Appeals be reversed and the case remanded for a determination of the issue of liability consistent with the proper legal standard.

Respectfully submitted,

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APPENDIX

Statutes Involved

Sherman Act, Sections 1-2
15 U.S.C. §§ 1-2

§ 1. *Trusts, etc., in restraint of trade illegal; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. *Monopolizing trade a felony; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade of commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.